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No. 80-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner

v.

STATE OF ALABAMA AND STATE OF NEVADA,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM OF STATES OF CALIFORNIA, MICHIGAN, OHIO, OREGON, TENNESSEE, TEXAS, WASHINGTON AND WISCONSIN AS AMICI CURIAE IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION OF ALABAMA AND NEVADA FOR CONSOLIDATION WITH NO. 80-120

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QUESTIONS PRESENTED

The States of California, Michigan, Ohio, Oregon, Tennessee, Texas, Washington and Wisconsin as Amici Curiae adopt the statement of questions presented set forth in the Response of States of Alabama and Nevada In Support of the Petition for a Writ of Certiorari and Motion of States of Alabama and Nevada for Consolidation with No. 80-120.

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INTEREST OF THE STATES OF CALIFORNIA, MICHIGAN, OHIO, OREGON, TENNESSEE, TEXAS, WASHINGTON AND WISCONSIN AS AMICI CURIAE

The decision of the United States Court of Appeals for the Fifth Circuit from which the United States Secretary of Labor files a petition for a writ of certiorari set aside the Secretary of Labor's ruling that the States of Alabama and Nevada were not in compliance with the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311

("FUTA"). The Fifth Circuit held that the Secretary of Labor erred in interpreting section 3309(b)(1) of FUTA to require that state unemployment compensation laws cover employees in church elementary and secondary schools. *States of Alabama & Nevada* v. *Marshall*, 626 F.2d 366 (1980). The Fifth Circuit's ruling is contrary to the decision of the Supreme Court of South Dakota, which this Court decided to review on November 3, 1980. *In re Northwestern Lutheran Academy*, 290 N.W.2d 845 (1980), *cert. granted sub nom. St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota*, No. 80-120.

On August 29, 1980, the Secretary of Labor informed the States of California, Michigan, Ohio, Oregon, Tennessee, Texas, Washington and Wisconsin (the "Amici States") that he intended to institute proceedings to withhold certification under FUTA from those States for 1981 as a result of their failure to comply with his interpretation of FUTA regarding coverage of employees in church elementary and secondary schools.[1] After the decision of the Fifth Circuit rejecting his interpretation of FUTA, the Secretary of Labor advised the Amici States that proceedings against them would be stayed because of the likelihood that this Court would determine the validity of the Secretary's position.

If this Court upholds the Secretary of Labor's interpretation of FUTA regarding church schools, it is likely that the Amici States will be decertified under FUTA and as a result will lose hundreds of millions of dollars in federal funds essential to the administration of their

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[1] The Secretary of Labor had previously instituted proceedings to withhold certification from the Amici States for the 1980 certification period due to their failure to follow his interpretation. However, because the Amici States contended that the Secretary had failed to allow them sufficient time for a hearing, the Secretary decided to certify them and institute new proceedings for 1981.

unemployment compensation programs and public employment offices. *See* 29 U.S.C. §§ 49-49k; 42 U.S.C. §§ 501-504. In addition, employers within the States may lose billions of dollars in credits against the federal unemployment tax. *See* 26 U.S.C. § 3302. The States thus have a substantial interest in resolution of the issues presented in this case.[2]

SUMMARY OF ARGUMENT

The Amici States agree with Petitioner and Respondents that the Court should grant the petition for a writ of certiorari in this case to resolve the important national issues raised by the Secretary of Labor's interpretation of FUTA regarding coverage for church elementary and secondary school employees. As more fully explained below, Amici States also urge the Court to consolidate this case for review with the case from the Supreme Court of South Dakota, No. 80-120, in order to give the Court a full record for review and a complete basis on which to analyze the statutory and constitutional issues presented by the Secretary of Labor's position.

ARGUMENT

The Amici States agree with both the Petitioner and Respondents in the instant case that the issues presented in this case and in *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota,* No. 80-120, now pending in this Court, are of great national importance in the administration of the federal-state unemployment insurance program. It is equally clear that there now exists an unequivocal conflict in the decisions in these two cases that can be resolved only by this Court.

The Amici States respectfully request the Court to consolidate this case for full review with No. 80-120. These eight States believe that the extensive record that was

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[2] This Memorandum is being filed pursuant to Rule 36.4 of this Court's Rules.

developed during the administrative proceedings by the Secretary of Labor against the States of Alabama and Nevada, taken in conjunction with the record of the South Dakota case, will provide the Court with a much broader perspective upon which to base a decision. The South Dakota case does not directly involve the question of the proper interpretation and application of FUTA, nor does it involve the question of whether the South Dakota law was in conformity with the federal statute. The case from the Fifth Circuit clearly presents the United States Secretary of Labor's interpretation and application of FUTA, the federal statutory provisions and constitutional issue, and the impact of the Secretary of Labor's ruling, not simply with respect to South Dakota, but with respect to all fifty states.

It is of great importance to these eight States that the issue presented in these two cases be resolved by the Supreme Court. If the Secretary of Labor's interpretation is upheld, it is likely that the state unemployment compensation laws of the Amici States would be held out of conformity with FUTA, which would subject these States to the loss of hundreds of millions of dollars in federal grants for administration of their unemployment compensation laws and public employment offices and would also subject private employers in these States to the loss of billions of dollars of tax credits against the federal unemployment tax. For these reasons, the Amici States have a very substantial interest in the resolution of this issue and we respectfully urge the Court to consolidate these cases for prompt decision.

CONCLUSION

The interests of all affected states in the efficient administration of justice and the avoidance of needless litigation are best served by a prompt decision which considers the records and judicial analyses which are part of the instant case and the case from the Supreme Court

of South Dakota. The States of California, Michigan, Ohio, Oregon, Tennessee, Texas, Washington and Wisconsin therefore urge the Court to grant the petition for a writ of certiorari in this case and to grant the motion of Alabama and Nevada for consolidation with No. 80-120.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Memorandum of States of California, Michigan, Ohio, Oregon, Tennessee, Texas, Washington and Wisconsin as Amici Curiae in Response to Petition for Writ of Certiorari and in Support of Motion of Alabama and Nevada for Consolidation with No. 80-120 were served this 9th day of December, 1980, by hand on Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for Secretary of Labor Ray Marshall, and Allen R. Snyder, Esq., Hogan & Hartson, 815 Connecticut Avenue, Washington, D.C. 20006, counsel for States of Alabama and Nevada; and by mail, postage prepaid, on Edward Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, counsel for Petitioners in No. 80-120; and Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, counsel for Respondent in No. 80-120.

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